Filed 12/14/01

NOT TO BE PUBLISHED

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

JOSEPHINE GARCIA et al.,	
Plaintiffs and Appellants,	E025239
v.	(Super.Ct.No. 273621)
COUNTY OF RIVERSIDE,	**OPINION**
Defendant and Respondent.	

APPEAL from the Superior Court of Riverside County. Charles D. Field, Judge. Appeal dismissed.

Patricia M. Forster for Plaintiffs and Appellants.

Bell, Orrock & Watase, Michael A. Bell, Micheal A. Fortino; Greines, Martin, Stein & Richland, Timothy T. Coates, and Laura Boudreau for Defendant and Respondent.

Plaintiffs Josephine Garcia, Ruben Ray Garcia, and Mauro Garcia (collectively the Garcias) seek review of a summary judgment in favor of defendant the County of Riverside (the County). The County contends their appeal is untimely. We agree. Accordingly, we must dismiss the appeal.

I

PROCEDURAL BACKGROUND

The Garcias have asked us to take judicial notice of the superior court's register of actions in this case. The County does not object. The register of actions is judicially noticeable. (Evid. Code, §§ 452, subd. (d)(1), 459, subd. (a); *City and County of San Francisco v. Carraro* (1963) 220 Cal.App.2d 509, 527.) Accordingly, we hereby grant the request.

In addition, having notified the parties that we intended to do so, we hereby take judicial notice of this court's files in an earlier appeal in this action, Case No. E023976.

A. *The Trial Court's Order Granting the Motion*.

The trial court issued a minute order granting the County's motion for summary judgment. The Garcias filed a motion for reconsideration, which the trial court denied.

The Garcias filed a notice of appeal, purportedly from the minute order granting the motion for summary judgment. The County then filed a memorandum of costs and a motion for attorney's fees. The Garcias failed to file a timely motion to tax costs. Thereafter, the trial court denied the County's motion for attorney's fees. Meanwhile, we dismissed the Garcias' appeal without prejudice because there was as yet no appealable final judgment. (See generally *Shpiller v. Harry C's Redlands* (1993) 13 Cal.App.4th 1177, 1178-1180.)

B. *The February 3 Order: With Miscitation; Without Costs*.

On February 3, 1999, the trial court entered an "Order Granting Motion for Summary Judgment and Judgment." (Capitalization altered.) It provided, as pertinent here:

"[D]efendant, County of Riverside, is entitled to judgment as a matter of law for the following reasons:

"1. Defendant, County of Riverside, in support of their [*sic*] motion preferred [*sic*] evidence at [*sic*] that the County of Riverside had not accepted into its Maintained Road System Watson Road, east of Menifee Road. Thus, pursuant to *Streets & Highway* [*sic*] *Code* §914(b) [*sic*], the County cannot be held liable for failure to maintain a road not accepted into its dedicated maintained system.

"**IT IS ORDERED, ADJUDGED AND DECREED** that defendant, County of Riverside's, motion for summary judgment be granted.

"**IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that defendant, County of Riverside, shall recover from plaintiffs, Josephine Garcia, Ruben Ray Garcia and Danny Garcia, reasonable expenses and attorney's fees and [*sic*] according to proof and noticed motion." (Capitalization altered.)

On February 10, 1999, the County served a document entitled "Service of Order Granting Motion for Summary Judgment," which stated: "Please take notice that on February 3, 1999, judgment of [*sic*] the County of Riverside as against [the Garcias] was executed [*sic*] by [the trial court]." (Capitalization altered.) Attached was a file-stamped and signature-stamped copy of the February 3 order.

C. *The February 11 Order: With Miscitation; With Costs*.

On or about February 8, 1999, the County submitted a new proposed "Order Granting Motion for Summary Judgment and Judgment." (Capitalization altered.) On February 11, 1999, the trial court signed and entered it. The February 11 order was

essentially identical to the February 3 order (including all grammatical and typographical errors), except that it replaced the "reasonable expenses" provision with a specific provision that the County "shall recover . . . the sum of $7[,]516.57 for statutory costs in this matter."

On February 16, 1999, the Garcias filed a "Motion to Correct Order Nunc Pro Tunc . . . ." (Capitalization altered.) In it, they objected to the February 11 order, arguing, among other things, that the citation to Streets and Highways Code section "914(b)" should have been to "941(b)" and that they had not yet had an opportunity to be heard on the cost issue. On March 22, 1999, the trial court denied the motion.

D. *The April 26 Order: Without Miscitation; Without Costs*.

On or about April 22, 1999, the County submitted a proposed "Amended Order Granting Motion for Summary Judgment and Judgment." (Capitalization altered.) On April 26, 1999, the trial court signed and entered it. The April 26 order was essentially identical to the February 3 order, except that it correctly cited Streets and Highways Code section "941(b)." Thus, unlike the February 11 order, it did not award a specific amount of costs; rather, it stated, as had the February 3 order, that the County "shall recover . . . reasonable expenses and attorney's fees and [*sic*] according to proof and noticed motion."

On June 22, 1999, the Garcias filed a notice of appeal "from the [j]udgment . . . dated April 26, 1999 . . . ."

E. *The June 24 Judgment: Without Miscitation and With More Costs*.

Meanwhile, on or about June 21, 1999, the County submitted a proposed "Judgment." On June 24, 1999, the trial court signed and entered it. The June 24 judgment

was essentially identical to the February 3 order, except that: (1) it correctly cited Streets and Highways Code section "941(b)"; (2) in place of the provision "that defendant, County of Riverside's, motion for summary judgment be granted," it stated "[t]hat on April 26, 1999, the [trial court] signed the Amended Order granting Motion for Summary Judgment and Judgment"; and (3) in place of the "reasonable expenses" provision, it stated that the County "shall recover . . . statutory costs pursuant to *C.C.P.* §1033.5, in the principal sum of $30,265.92 . . . ."

II

ANALYSIS

As a general rule, subject to specific exceptions, "an appeal may be taken only from the final judgment in an entire action. [Citations.]" (*Tenhet v. Boswell* (1976) 18 Cal.3d 150, 153.) "Judgments that leave nothing to be decided between one or more parties and their adversaries, or that can be amended to encompass all controverted issues, have the finality required . . . ." (*Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 741.)

A judgment which otherwise finally determines the issues raised in the pleadings is no less final because it leaves costs to be determined later. (*UAP-Columbus JV 326132 v. Nesbitt* (1991) 234 Cal.App.3d 1028, 1035-1036.) The trial court retains jurisdiction to award costs even after a notice of appeal from the original judgment has been filed. (*Nazemi v. Tseng* (1992) 5 Cal.App.4th 1633, 1639-1640; *Dameshghi v. Texaco Refining & Marketing, Inc.* (1992) 3 Cal.App.4th 1262, 1288-1290, disapproved on other grounds in *Trope v. Katz* (1995) 11 Cal.4th 274, 292.) Ordinarily, the subsequent award of costs is separately appealable as an order made after judgment. (Code Civ. Proc., § 904.1, subd.

(a)(2); *Empire Gravel Min. Co. v. Bonanza Gravel Min. Co.* (1885) 67 Cal. 406, 410-411; *Robinson v. City of Yucaipa* (1994) 28 Cal.App.4th 1506, 1517-1518 [Fourth Dist., Div. Two].) Under certain circumstances, however, if the original judgment expressly provides for an award of costs in an amount to be determined later, the subsequent award of costs may be reviewed in an appeal from the original judgment. (Compare *Soldate v. Fidelity Nat. Financial, Inc.* (1998) 62 Cal.App.4th 1069, 1073-1075 with *Grant v. List & Lathrop* (1992) 2 Cal.App.4th 993, 997-998.)

Here, the February 3 order was obviously intended to remedy the lack of a final judgment which led us to dismiss the Garcias' first appeal. It was entitled, "Order Granting Motion for Summary Judgment *and Judgment*." (Italics added.) It "ordered, adjudged and decreed" that the County was to recover costs from the Garcias. (Capitalization omitted.) An order granting a motion for summary judgment would not award costs, but a judgment would. Admittedly, it did not order, adjudge, or decree that, contrariwise, the Garcias were to "take nothing" from the County, but it did not have to. Indeed, none of the orders in this action ever contained such a statement. Aside from the amount of the cost award, it completely resolved all of the issues raised by the pleadings. Thus, it was the final, appealable judgment.

Rule 2(a) of the California Rules of Court, as pertinent here, provides: "[A] notice of appeal from a judgment shall be filed on or before the earliest of the following dates: (1) 60 days after the date of mailing by the clerk of the court of a document entitled 'notice of entry' of judgment; (2) 60 days after the date of service of a document entitled 'notice of entry' of judgment by any party upon the party filing the notice of appeal, or by the party

filing the notice of appeal; or (3) 180 days after the date of entry of the judgment. For the purposes of this subdivision, a file-stamped copy of the judgment may be used in place of the document entitled 'notice of entry'."

On February 10, the County served a document entitled "Service of Order Granting Motion for Summary Judgment" on the Garcias. Although it was not entitled "notice of entry," it did include a file-stamped copy of the February 3 order. "Delivery of a conformed copy of the judgment, albeit not a document with the label 'notice of entry of judgment,' constitutes proper service of notice of entry of judgment . . . ." (*Dodge v. Superior Court* (2000) 77 Cal.App.4th 513, 518; see also *20th Century Ins. Co. v. Superior Court* (1994) 28 Cal.App.4th 666, 671.) Thus, service of this document started the 60-day time period for appeal running.

The February 11 order was identical to the February 3 order, except that it awarded a specific amount of costs. As already noted, a postjudgment order awarding costs is separately appealable. "'When a judgment includes an award of costs and fees, often the amount of the award is left blank for future determination. [Citation.] . . . When the order setting the final amount is filed, the clerk enters the amounts on the judgment nunc pro tunc. [Citation.]'" (*Nazemi v. Tseng*, *supra*, 5 Cal.App.4th at p. 1637, quoting *Grant v. List & Lathrop*, *supra*, 2 Cal.App.4th at pp. 996-997.) Alternatively, however, the trial court may enter an amended judgment which specifies the amount of the cost award. (E.g., *Gordon's Cabinet Shop v. State Comp. Ins. Fund* (1999) 74 Cal.App.4th 33, 38 [Fourth Dist., Div. Two].) It should not make any difference which method the trial court uses.

Here, the addition of a cost award did not affect the finality of the February 3 order and therefore did not restart the clock.

The April 26 order essentially reinstated the February 3 order. It amended the February 3 order only minimally — it transposed two digits to correct a typographical error. "It is settled that where [an] amendment merely corrects a clerical error and does not involve the exercise of judicial discretion, the original judgment remains effective and unimpaired and the amendment does not operate as a new judgment from which a new appeal may be taken. [Citations.]" (*Mulder v. Mendo Wood Products, Inc.* (1964) 225 Cal.App.2d 619, 635; accord, *Stone v. Regents of University of California* (1999) 77 Cal.App.4th 736, 743-744; *George v. Bekins Van & Storage Co.* (1948) 83 Cal.App.2d 478, 480-482.) Thus, the April 26 order could not restart the time to appeal.

Even assuming, for the sake of argument, the February 3 order was not appealable, then neither was the April 26 order. We can see no rational way to conclude that the April 26 order was appealable but the February 3 order was not. Nevertheless, on June 22, the Garcias purported to appeal from the April 26 order. By that time, it was too late to appeal from the February 3 order.

Indeed, the Garcias do not even claim their appeal was timely. Rather, they contend it was premature. They assert that the June 24 judgment was actually the appealable final judgment in this case. But there are at least two flaws in this argument.

First, "'[i]t is not the form of the decree but the substance and effect of the adjudication which is determinative.'" (*Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 698, quoting *Lyons v. Goss* (1942) 19 Cal.2d 659, 670.) A document labeled

"order" may be an appealable judgment (e.g., *Furtado v. Schriefer* (1991) 228 Cal.App.3d 1608, 1613-1614); a document labeled "judgment" may be a nonappealable order. (E.g., *Rubin v. Western Mutual Ins. Co.* (1999) 71 Cal.App.4th 1539, 1544-1548.) Thus, the fact that the June 24 judgment was labeled a "judgment" did not make it one.

Second, the June 24 judgment was effectively identical to the February 3 order, except that it awarded a specific amount of costs. As already discussed, this cost award was separately appealable. The fact that the June 24 judgment incorporated the terms of the February 3 order did not give the Garcias a second bite at the appellate apple.

We conclude that the appeal must be dismissed.

II

DISPOSITION

The appeal is dismissed. The County shall recover costs on appeal against the Garcias.

NOT TO BE PUBLISHED

RICHLI
J.

We concur:

RAMIREZ
P.J.

HOLLENHORST
J.